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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL E. TOTH et al.,	
Plaintiffs and Appellants,	G041307
v.	(Super. Ct. No. 07CC08376)
CITY OF ANAHEIM,	O P I N I O N
Defendant and Respondent;	
CITY OF LOS ANGELES,	
Intervener and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Robert D. Monarch, Judge. (Retired Judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

The Traut Firm and Eric V. Traut for Plaintiffs and Appellants.

Rockard J. Delgadillo, City Attorney, and Gail Owen-Smith, Deputy City Attorney, for Intervener and Appellant.

Christina L. Talley, City Attorney, and Mark S. Facer, Deputy City Attorney, for Defendant and Respondent.

Plaintiffs Michael E. Toth (plaintiff, where appropriate in context) and Sarah J. Toth and intervener City of Los Angeles appeal after summary judgment was entered in favor of defendant City of Anaheim in plaintiffs' action seeking damages for a dangerous condition and negligence. Plaintiffs challenge the judgment on several grounds: 1) defendant did not meet its initial burden to support the motion; 2) their expert's declaration, portions of which the court erroneously did not consider, supports both of their causes of action; 3) the firefighter's rule does not apply; and 4) defendant's motion for summary adjudication was procedurally improper. We affirm.

FACTS AND PROCEDURAL HISTORY

"Since this is an appeal from the entry of summary judgment, we independently examine the record to determine whether triable issues of fact exist. [Citation.] In doing so, we view the evidence in a light most favorable to plaintiff[s], the losing part[ies]. [Citation.]" (*Minch v. California Highway Patrol* (2006) 140 Cal.App.4th 895, 899.) We "'consider[] all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' [Citation.]" (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037.) On that basis, we derive the following facts from the record.

At about 4:30 a.m., plaintiff, an on-duty Los Angeles Police Department officer, was riding his motorcycle to work, traveling northbound on Disneyland Drive. At the intersection of Disneyland Drive and Magic Way, Anaheim Police Officers Eddie Gomez and Hart were at the north side of the intersection, blocking northbound traffic on Disneyland Drive after an earlier fatal accident north of the intersection. Cars approaching the intersection were prevented from proceeding northbound on Disneyland Drive by the officers' police cars but had to turn left and proceed westbound on to Magic

Way. They did this by moving into the two left-hand turn lanes on Disneyland Drive. Traffic lights were operating correctly.

Plaintiff's employer had a policy that when a police officer was in uniform and driving a police vehicle, he stop and assist. When plaintiff approached the roadblock, instead of turning on to Magic Way, he drove through it, past the police cars, and stopped where defendant's officers were standing behind the crosswalk. He conversed with the officers, asking what was happening. They told him the situation was under control and advised he could not proceed northbound on Disneyland Drive but had to get on Magic Way going west. Plaintiff backed up his motorcycle and proceeded west across Disneyland Drive toward Magic Way. The officers looked away and a few seconds later, after hearing a crash, saw that plaintiff had collided with a car that had been going south on Disneyland Drive. Gomez saw that the signal for traffic turning from northbound Disneyland Drive on to Magic Way was red. As a result of the collision, plaintiff was injured.

Plaintiff did not ask the officers for help in leaving the roadblock. The officers had not told plaintiff that southbound traffic on Disneyland Drive had been blocked, nor had they directed him as to how to go through the intersection. Had plaintiff obeyed the traffic signals the collision would have been avoided. No other vehicles going through the intersection had had problems during the two hours of the roadblock before plaintiff's accident. The design of the intersection, including operation of the traffic signals, is such that a driver in the correct lane will be able to clearly see oncoming traffic without obstruction by shrubbery.

Plaintiffs filed a complaint alleging two causes of action, defendant's maintenance of a dangerous condition and negligence. As to the dangerous condition claim, plaintiffs alleged defendant did not properly maintain the shrubbery in the median on Disneyland Drive and it blocked drivers' view. They also alleged part of the dangerous condition was caused by defendant's officers "direct[ing plaintiff] to take an

alternate route, without assuring that he could safely do so" "despite having established a '[s]pecial [r]elationship with [him]." In the negligence cause of action plaintiffs pleaded the officers did not close off southbound Disneyland Drive or, alternatively, properly direct traffic, and did not maintain the shrubbery to avoid blocking drivers' views. Intervener's complaint is based on its payment to plaintiff of workers' compensation and other benefits.

Defendant filed a motion for summary judgment or, alternatively, motion for summary adjudication on the ground defendant owed no duty to plaintiff and did not create a dangerous condition. It also asserted the firefighter's rule barred recovery. The court granted the motion on the ground that there was no triable issue of fact that the traffic blockade and the shrubbery were safe and that plaintiff, without checking for southbound traffic on Disneyland Drive, had gone against the traffic light.

DISCUSSION

1. Introduction

A defendant moving for summary judgment bears the burden of demonstrating that one of the elements of the cause of action "cannot be established, or that there is a complete defense . . . ." (Code Civ. Proc ., § 437c, subd. (p)(2); see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once sufficient evidence is produced to meet this burden, the burden shifts to the plaintiff to produce sufficient evidence to demonstrate that a triable issue of material fact exists. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) Plaintiffs contend defendant did not meet its initial burden to defeat either cause of action because it did not negate the entirety of the complaint. Based on our independent review of the motion (*id*. at p. 860), we disagree.

2. Dangerous Condition

Plaintiffs argue the alleged dangerous condition about which they complain is based on "alternate theories" "related to the combined effects of the roadblock and the shrubbery" in the median.

Defendant can be liable for plaintiff's injuries due to a dangerous condition if, among other things, there was "a reasonably foreseeable risk of the kind of injury" suffered and defendant's employee created the dangerous condition. (Gov. Code, § 835, subd. (a).) A dangerous condition is one "that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).) "'Whether property is in a dangerous condition often presents a question of fact, but summary judgment is appropriate if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines that no reasonable person would conclude the condition created a substantial risk of injury when such property is used with due care in a manner which is reasonably foreseeable that it would be used. (Gov. Code, § 830.2; [citations].)' [Citation.]" (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234.) Using this standard of analysis summary judgment was properly granted.

Plaintiff submits a laundry list of items he claims created the dangerous condition. First, apparently setting up the blockade itself was dangerous because defendant should have expected plaintiff and other drivers would cross the intersection and drive up to the roadblock to ask questions. This is based on the procedure of plaintiff's employer requiring plaintiff to stop and render assistance. But plaintiff's accident was not created by the roadblock itself; it was caused by plaintiff's conduct after leaving it.

Plaintiff also points out that there are signals only on Disneyland Drive; there are none for cars going westbound on Magic Way that need to cross southbound

Disneyland Drive. He relies, in part on a portion of a declaration submitted by defendant, but that passage was stricken in response to plaintiff's objection. And, as plaintiff acknowledges, Magic Way dead ends at Disneyland Drive so generally there would be no traffic from Magic Way east of Disneyland Drive and no signals would be necessary. Plaintiff further asserts the shrubbery in the median on Disneyland Drive blocked his view when leaving the blockade.

According to plaintiff the above factors combined to create a dangerous condition where he could not see southbound traffic and did not know if it had been blocked as part of the roadblock, he could not see the signal on Disneyland Drive, and he "was at the mercy of defendant's officers" who did not assist him in driving on to Magic Way. But these conclusions either are not supported by the evidence or are legally untenable.

First, from where plaintiff left the roadblock it does appear he could not see southbound traffic. But it was not reasonably foreseeable, as required by Government Code section 830, subdivision (a), that, even given the roadblock, someone would be driving from that location on to Magic Way. Moreover, when proceeding northbound on Disneyland Drive before reaching the roadblock, a reasonable person could have seen that southbound traffic was not blocked. This goes to the element of due care as set out in Government Code, section 830.2.

Likewise, it was not reasonably foreseeable that a driver would be required to see the signal on Disneyland Drive. Despite the policy of the Los Angeles Police Department that plaintiff stop and render assistance, it was not likely that a vehicle would drive up to the roadblock and there is no evidence any others actually did. And, even assuming such a maneuver, a reasonable person who could not see southbound traffic or the signal, would assure himself or herself there was no oncoming traffic.

"'"[E]ven though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to

protect such persons." [Citations.] Any property can be dangerous if used in a sufficiently abnormal manner; a public entity is required only to make its property safe for reasonably foreseeable careful use.'" (*Sambrano v. City of San Diego, supra*, 94 Cal.App.4th at p. 239.) "'If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not "dangerous" within the meaning of section 830, subdivision (a).' [Citation.]" (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196.)

Plaintiff argues that we cannot consider his comparative negligence in determining a dangerous condition. We agree and have not. But in deciding whether a condition is dangerous we must determine whether it is dangerous when "used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).)

Plaintiff challenges the evidence presented in support of the motion, claiming the court did not strictly construe it, as required. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142 [moving party's evidence strictly construed and opposing party's viewed liberally].) He particularly objects to evidence regarding the shrubbery. He points to one paragraph in the declaration of Rock Miller, defendant's registered traffic engineer expert. It states that the intersection at Disneyland Drive and Magic Way is designed in such a way that vehicles cannot cross where foliage in the median would obstruct the view of traffic coming from the opposite direction and that a driver using due care would not try to cross the intersection from a spot where the view would be blocked by shrubbery.

Plaintiff observes that Miller did not visit the scene or review plans of the intersection but looked only at the photographs of the accident and police reports. On the other hand, he notes, the trial court gave little weight to the declaration of his expert, Richard C. Rinker, who did visit the intersection and made measurements. But the

portion of Miller's declaration that plaintiff criticized, that the intersection was designed so drivers in "the proper lanes" will be able to clearly see oncoming traffic without obstruction by shrubs, may be deduced from photographs showing the scene of the accident, which he reviewed. We did not rely on any of defendant's evidence to which the trial court sustained objections. Moreover, we review the motion de novo and the trial court's reliance on a particular piece of evidence is not relevant to our decision.

Plaintiff relies, as he did in the trial court, on the declaration of Rinker to create a triable issue of fact. He notes the judge did "not place significant weight on" it, finding Rinker's "conclusions are based on assumptions which are not supported by the record" and not by "that which is relied upon by other experts" but instead are based "on factors that are speculative and conjectural." Plaintiff argues the facts in declarations opposing a summary judgment "must be accepted as true" (*Blaustein v. Burton* (1970) 9 Cal.App.3d 161, 175-176) and "need not necessarily be composed wholly of strictly evidentiary facts" (*id*. at p. 176). He further asserts that because the court never ruled on defendant's objections to Rinker's declaration, we must accept the entirety of the declaration or at least may not go beyond defendant's objections. Not so.

"'"'[W]hile the court in determining a motion for summary judgment does not 'try' the case, the court is bound to consider the competence of the evidence presented." [Citation.]' [Citation.]" (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525-526.) "'It is not enough to produce just some evidence. The evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment.' [Citation.] Notably, '[p]laintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation or reasoning.' [Citation.] '[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more

than the reasons and facts on which it is based.' [Citation.]" (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 108.)

As to the dangerous condition claim, plaintiff points to Rinker's statement that the police report noted, and he had personally observed, "a vision obstruction caused by the shrubbery" in the median that "affected" plaintiff's "field of view." He concludes this imposed additional responsibility on the officers to assist drivers across the intersection. We are not persuaded.

First, Rinker declared he was a "crash data retrieval analys[t]" and "accident reconstruction expert." (Capitalization omitted.) This opinion does not fall within that area of expertise. Further, as stated above, even assuming plaintiff's vision was blocked, it was only because of where he had stopped his motorcycle, not a foreseeable location. There is no evidence any other drivers would have stopped at all or stopped there. Moreover, it is foreseeable that a reasonable person leaving the location would ensure that he or she could see southbound traffic. As to the other driver in the collision, it was not foreseeable that a driver would be leaving the intersection from plaintiff's point of departure.

Plaintiff also relies on Rinker's opinion that, under the Vehicle Code and based on his location and the officers' instructions for him to leave, he had no choice but to proceed southbound on Disneyland Drive or cross that road. This also is not persuasive. Assuming those were his only two choices, this does not mean that a driver in that situation would be relieved of the duty to proceed with care or that it was reasonably foreseeable a driver would be at the roadblock to begin with.

In sum, as a matter of law there was no dangerous condition caused by the roadblock, shrubbery, or any combination of them.

3. Negligence

As to the negligence claim, defendant maintained it owed no duty to plaintiff. Plaintiffs counter by positing the existence of a duty and an argument defendant breached it by either failing to block southbound traffic on Disneyland Drive or directing traffic "to avoid the foreseeable risk of harm." Plaintiff also maintains defendant owed him a special duty. Defendant makes no claim of immunity.

Under Government Code section 820, subdivision (a), "a public employee is liable for injury caused by his act or omission to the same extent as a private person" unless otherwise statutorily excepted. A municipality is liable for the negligence of an employee acting in the scope of employment if the employee could have been sued for that purported negligence, unless the employee would be immune. (Gov. Code, § 815.2, subds. (a), (b).) Here there is no question the officers were acting in the scope of their employment, so we analyze the issue of duty under "ordinary and general principles of tort law." (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 715-716.)

Plaintiff maintains defendant's duty "arose from erection of the roadblock as it was, where it was" and cites a 1953 Hawaii federal district court case, *Hernandez v. United States* (D.Hawaii 1953) 112 F.Supp. 369, to support his claim the officers had an absolute duty to warn him "'of the hazard [they] created.'" (*Id*. at p. 371.) But he provides no California cases to support this purported rule, only citing three cases for the proposition that *Hernandez* is authority for the rule that statutory immunity does not trump a duty to warn. He then leaps to the conclusion the absolute duty in *Hernandez* "should apply" here. This does not persuade.

First, by arguing the duty arose from the fact the roadblock was set up and where and how, plaintiff is conflating simple negligence with a dangerous condition, a claim which, as discussed above, is not sustainable. Second, case law does not support plaintiff's claim the officers had a duty to warn or that there was any duty under common law negligence.

Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112 is instructive. In that case after a woman was shot and killed by her ex-husband at a courthouse, on the basis of a general negligence theory her children sued the county and the sheriffs for failing to provide security sufficient to protect against violence in the courthouse. After the trial court sustained a demurrer the Supreme Court affirmed. In so doing it acknowledged the general rule that "'[u]nder general negligence principles . . . a person ordinarily is obligated to exercise due care in his or her own actions so as . . . not to create an unreasonable risk of injury to others . . . . [Citations.] It is well established . . . that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct . . . of a third person. [Citations.]' [Citation.]" (*Id.* at p. 1128.)

The court continued, limiting that general principle, however, by stating that "past cases establish that police officers . . ., like other persons, generally may not be held liable in damages for failing to take affirmative steps to come to the aid of, or prevent an injury to, another person. 'As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.' [Citation.] More specifically, 'law enforcement officers, like other members of the public, generally do not have a legal duty to come to the aid of [another] person . . . .' [Citation.]" (*Zelig v. County of Los Angeles, supra,* 27 Cal.4th at pp. 1128-1129.)

In *Zelig* the court also set out when a duty arises: "Liability may be imposed if an officer voluntarily assumes a duty to provide a particular level of protection, and then fails to do so [citations], or if an officer undertakes affirmative acts that increase the risk of harm to the plaintiff. [Citations.]" (*Zelig v. County of Los Angeles, supra,* 27 Cal.4th at p. 1129.) *Williams v. State of California* (1983) 34 Cal.3d

18 illustrated that principle using as an example a case "where an officer investigating an accident directed the plaintiff to follow him into the middle of the intersection where the plaintiff was hit by another car." (*Id* at p. 24.)

In our case plaintiff does not claim the officers took any affirmative steps that increased the risk he would be harmed. Likewise plaintiff does not maintain they assumed any duty to protect in any way. To the contrary plaintiff claims the officer did not do anything at all, specifically failing to warn him. As a matter of law based on these allegations the officers, and thus defendant, did not owe plaintiff any duty.

As an alternative argument plaintiff asserts there was a "special relationship" between plaintiff, as a police officer, and defendant's officers, as contrasted with the relationship between defendant's officers and a general member of the public. He contends that because he did not set up the roadblock and the extent of his knowledge about the situation was less than the officers', somehow defendant owed him a special duty. In support of this he relies primarily on the same facts as he argued with reference to the dangerous condition claim. The officers knew plaintiff could not "re-enter the flow of traffic without facing the peril of crossing southbound traffic or traveling in the wrong direction against northbound traffic." He claims it is "reasonable to infer" the officers knew the shrubbery in the median blocked plaintiff's ability to see cars traveling southbound on Disneyland Way.

Plaintiff also relies on the statement in Gomez's declaration that he "explained the situation" to plaintiff but emphasizes this does not state what Gomez actually said. He points to additional statements in Gomez's declaration that Gomez did not advise plaintiff how to get across Disneyland Drive on to Magic Way; he just instructed him he had to proceed on Magic Way. He comments that a jury could determine from these facts that blocking the intersection created danger and the officers added to it by not warning him about southbound traffic. From all of this he concludes a

special relationship was created and the officers "could have very easily taken steps to protect" plaintiff.

But this conclusion does not flow logically at all. We fail to see how a police officer interacting with other officers creates a special relationship. Nor does Rinker's declaration help. Rinker stated that based on his review of the police report, photographs, and the like, and his expertise, education, and experience, because the officers blocked northbound traffic and failed to make sure plaintiff could proceed on the alternate route, they created a special relationship with plaintiff. Again, this opinion is not within Rinker's area of expertise. Further, it is not supported by case law.

A special relationship can be created when "a police officer . . . undertakes to come to the aid of another." (*Minch v. California Highway Patrol* (2006) 140 Cal.App.4th 895, 905.) In that case, the officer "will be liable if his failure to exercise care increases the risk of harm or the harm is suffered because of the other's reliance on the undertaking." (*Ibid*.) But this rule is "narrow, to be applied in a limited class of unusual cases. [Citations.] The rule is not triggered 'simply because police officers responded to a call for assistance and took some action at the scene.' [Citations.] And it is not enough to assert that the law enforcement officers took control of the situation. [Citation.]" (*Ibid.*)

In *Minch* the court affirmed summary judgment in favor of the defendant. There two of defendant's officers came upon a car upside down just off of a two-lane road and called for a tow truck. Plaintiff, the driver of the tow truck, retrieved the car and parked it and the truck on the shoulder. One officer left and the other went to a nearby curve in the road to direct traffic to slow down as it neared the vehicles. This was successful for a time but two cars then approached; the first slowed down but the second did not until it saw the first's brake lights. It slammed on the brakes and skidded into the tow truck, hurting the plaintiff. He sued, alleging the officers did not properly direct traffic to avoid hitting him.

The court found no special relationship because the officers "did not create the risk of harm." (*Minch v. California Highway Patrol, supra,* 140 Cal.App.4th at p. 906.) They did not tell the plaintiff where to park the tow truck or direct him to use the driver's side door. "[T]hey did not say anything to indicate that they would guarantee his safety." (*Ibid*.) These facts are strikingly similar to those here on which plaintiff relies to create a special relationship. Plaintiff seeks to distinguish *Minch*, arguing, in part, that the tow truck driver in that case was not relying on the officers while he was. But there is no evidence to support that claim.

Thus, there was no special duty or relationship, and defendant defeated the negligence cause of action.

4. Defendant's Notice of Motion and Separate Statement

Plaintiff also makes a procedural attack on the notice of motion and separate statement filed by defendant, claiming they did not conform to the requirements that the specific bases for summary adjudication be spelled out in those documents, that is, defendant did not set out in the separate statement headings and the specific issues to be adjudicated. (Cal. Rules of Court, rule 3.1350(h).) As a consequence, he continues, we can only consider this as a motion for summary judgment, requiring defendant to negate every theory under which plaintiff could possible recover. But the trial court apparently had no difficulty with form of the motion. And plaintiff does not direct us to any place in the record where he objected to the motion on this basis in the trial court. In fact, the titles of his three opposition documents specifically show he was responding to a motion for summary judgment "or, alternatively[,] summary adjudication." (Bold and capitalization omitted.) Defendant addressed the issues in the motion and plaintiff was able to respond to them. Denial of a motion on the basis of a failure to comply with rule 3.1350 "is discretionary, not mandatory. [Citations.]" (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118.) This is not a basis to reverse the judgment.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.